UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SYSCO COLUMBIA, LLC	Cases:	10-CA-197586
		10-CA-197588
and		10-CA-203636
		10-CA-210623
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION 509		

SYSCO COLUMBIA, LLC'S REPLY TO THE GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS

Consistent with Section 102.46(e) of the National Labor Relations Board ("NLRB" or the "Board") Rules and Regulations, Sysco Columbia, LLC ("Respondent" or "Sysco Columbia") submits this Reply to General Counsel's Brief in Answer to Respondent's Exceptions ("Answer"). Sysco Columbia addresses five arguments raised by Counsel for the General Counsel ("General Counsel"):

I. Twenty Documents and a Secret Recording Were Improperly Admitted Into Evidence

First, in the Answer, the General Counsel raises only one of the two glaring authentication issues raised by Sysco Columbia in its Exceptions. As stated in Respondent's Exceptions and Brief Supporting its Exceptions ("Brief"), Sysco Columbia excepted to the Administrative Law Judge's ("ALJ") decision to admit twenty (20) exhibits without following Federal Rules of Evidence, rules 401, 901 (generally), and 901(b)(1). The General Counsel fails to even state its position on the ALJ's failure to comply with the Federal Rules of Evidence. The ALJ's disregard for the Federal Rules of Evidence, as pointed out in Sysco Columbia's Brief, and reliance on the unauthenticated evidence, is egregious, and the ALJ's reliance upon this information as evidence of whether James Fix was a Section 2(11) supervisor was erroneous.

Rather than focusing on the twenty (20) improperly admitted exhibits, the General Counsel focuses solely on the recording that the GC contends was properly authenticated. The NLRB is statutorily required to follow "so far as practicable…the rules of evidence applicable to the district courts of the United States…" *See* National Labor Relations Act ("NLRA" or the "Act"), Section 10(b). Though the various circuit courts use their own words, the basic foundation is that the party offering an audio recording into evidence must show is settled law. Specifically, the General Counsel must show:

(1) That the recording device was capable of taking the conversation now offered in evidence;
(2) That the operator of the device was competent to operate the device;
(3) That the recording is authentic and correct;
(4) That changes, additions, or deletions have not been made in the recording;
(5) That the recording has been preserved in a manner that is shown to the court;
(6) That the speakers are identified; and
(7) That the conversation elicited was made voluntarily and in good faith.

See, e.g., U.S. v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974).

To correctly admit a recording into evidence, the NLRB requires: "[…] in part, proof of chain of custody, further, an explanation of any editing must be provided by someone with knowledge of editing." NLRB Hearing Officer's Guide at 150-151 (quoting *Medite of New Mexico Inc.*, 314 NLRB 1145, fn. 7 (1994)).

While the General Counsel argues that "a tape recording can be authenticated by circumstantial evidence," he fails to explain how the testimony satisfied the authentication factors set forth above. As expressed in Respondent's Exceptions and Brief, there is absolutely no evidence as to whether the recording is authentic, who the operator of the device was, whether they were competent to operate the device (in fact, to this day, the ALJ and Sysco Columbia have no knowledge of who created the recording), whether changes, additions, or deletions of the recording were made, what the chain of custody was, how Region 10 of the NLRB received the

recording, when and in what meeting the recording allegedly came from, and whether the recording was properly preserved. The General Counsel attempts to argue that Jonathan Brewer, Hilton Head Driver, properly authenticated the recording, but Mr. Brewer was not at the alleged and unknown meeting where the recording was allegedly taken. (Transcript 161:23-162:18). For these reasons alone, the ALJ should have denied admission of the recording.

II. Michael Brawner Did Not Have "Authority to Effectuate Promises"

Second, the General Counsel's conclusion that Michael Brawner ("Brawner"), Market President for the South East – Sysco Corporation, had "authority to effectuate promises" is contrary to the record. The General Counsel argues that Brawner had authority to effectuate promises because: (1) Sysco Columbia is a subsidiary of Sysco Corporation; (2) Brawner said he was in a position over Sysco Columbia's President in the corporate structure, and he was responsible of Sysco Columbia's performance at the end of the year; and (3) Brawner allegedly said he could fix several processes at Sysco Columbia, including communications, interactions between employees and management, balancing sales, reducing the number of small deliveries, and changing driver routes and loads.

Each argument made by the General Counsel must fail. First, the alleged fact that Sysco Columbia is a subsidiary of Sysco Corporation does not automatically mean that those who work with or for Sysco Corporation have authority to effectuate promises to employees of any of the subsidiaries. The General Counsel produced no evidence, and the transcript does not show, that this conclusion is accurate. Second, Brawner's responsibilities include ensuing that best practices are shared among eleven (11) operating companies, by acting "as a consultant when [each operating company] need[s] it." (Transcript 723:20-25; 804:9-17). Moreover, and as explained in the transcript and in Respondent's Brief, Brawner had absolutely no authority to hire, fire, set

wages or benefits, and he could not change or decide terms and conditions of employment or not make day-to-day decisions on behalf of Sysco Columbia. Finally, while Brawner allegedly used the term "fix" for many "processes," Brawner clearly demonstrated that no reasonable employee could have understood that as Brawner having authority, himself, to effectuate change at the Sysco Columbia level.

III. The Company Did Not Overly Complicate the Wage Analysis

Third, in its Answer, the General Counsel attempts to distract from the merits of Sysco Columbia's position by focusing on the alleged "overcomplication" of a complicated and widely varying wage analysis. The only individual who provided testimony regarding wage increases was Michael Turner ("Turner"), Sysco Columbia's Vice President of Operations. Over the course of one-hundred-plus pages of testimony, Turner explained each pay change, and how different each pay change was – not only year to year, but from employee to employee. Moreover, Turner explained: (1) wages increases were never automatic; (2) they were never set in timing; (3) wage increases were never set in an amount; (4) they were never set in form; and (5) they did not always occur. Such testimony, alone, shows just how complex the process is and has become. While arguing that Respondent "overcomplicated" the issues, the General Counsel admits that "some" of the employees "are compensated using a complicated formula." This alone verifies that the process of any such raises are complicated, and the "complicated formula," as explained in detail by Turner, varies in great detail. This demonstrates that there is no "typical wage increase" at Sysco Columbia.

IV. Statements Made on the DVD Were Lawful

Fourth, the DVD and the statements made within are completely lawful and not in violation of the Act. A portion of the DVD states: "And even if you didn't pay dues or didn't support the

union, your wages and benefits would still be frozen at status quo, during the possible months or years of negotiations." The ALJ and the General Counsel ignored that the DVD said wages would be "frozen *at the status quo*," and attempt to find a violation of the NLRA by arguing that an employer cannot state that wages will be frozen if there is a past practice of granting periodic wage increases. However, and as articulated in detail in Respondent's Brief, there was no past practice of granting periodic wage increases at set intervals or at set amounts, and making a statement in a DVD, as it relates to the facts of status quo and negotiations, is completely lawful and cannot be reasonably interpreted as a threat towards employees.

Terms such as "frozen" or "freeze" have been used in multiple instances, and have been found lawful when related to negotiations and status quo. *See e.g. Naomi Knitting Plant*, 328 NLRB 1279, 1290 (1999) (employer did not violate Act by telling employees: "Also, we discussed that in this bargaining process, your wages/benefits to be NEGOTIATED, starts at ZERO and *your current wages/benefits can be frozen until the bargaining process is complete*. THERE ARE NO GUARANTEES.") (emphasis in original); *Flexsteel Industries, Inc*., 311 NLRB 257 (1993) (lawful to tell employees "negotiations often go on for many months while your wages and benefits would be frozen by law"); *Mantrose-Haeuser Co*., 306 NLRB 377 (1992) (it was lawful to state in a booklet "while bargaining goes on, wage and benefit problems typically remain frozen until changed, if at all, by a contract"); *Uarco, Inc*., 286 NLRB 55 (1987) (references to wages being "frozen" during negotiations was lawful).

Accordingly, the Board must reverse the ALJ's decision that the one statement in the DVD, clearly taken out of context, does not violate the Act but, instead, reflects the factual reality of collective bargaining and negotiations.

V. The Request for Special Remedies Should Be Denied

Finally, in its Answer, the General Counsel attempts to classify the alleged violations as "numerous, pervasive, and outrageous" but fails to explain how any such actions were such, other than the overly broad conclusion that withholding of wage increases coupled with Section 8(a)(1) violations, must move the remedy to the next "level." Section 10(c) of at NLRA "at a minimum, encompasses the requirement that a proposed remedy be tailored to the unfair labor practice that it is intended to redress." *J.A. Croson Co.*, 359 NLRB 19, 26–27 (2012). Moreover, "special remedies" are necessary only if it can be demonstrated that the Board's traditional remedies will not adequately eliminate the effects of unfair labor practices. *See In Re Charlotte Amphitheater Corp.*, 331 NLRB 1274, 1277 (2000) (Brame, dissenting in part). In its Response, the General Counsel mimics the ALJ's conclusory language that the expanded remedies are justified by the "significant and pervasive unfair labor practices" Sysco Columbia allegedly committed. But, like the ALJ, the General Counsel fails to articulate how the expanded extraordinary remedies are tailored to redress the actual effects of the alleged violations or why traditional remedies are insufficient. Therefore, the ALJ's expanded remedies present circumstances that warrant Respondent's Exceptions.

VI. Conclusion

In short, the General Counsel's Answer has not raised compelling reasons to deny any of Sysco Columbia's Exceptions and, therefore, the ALJ's Decision should be reversed.

Respectfully submitted this 8th day of February, 2019.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: 

Mark M. Stubley
John Merrell
The Ogletree Building
300 North Main Street
Greenville, SC 29601
864.271.1300 (phone)
864.235.8806 (fax)

Attorneys for Sysco Columbia, LLC